Supreme Court, U. S.
FILED
JUN 14 1977
MICHAEL RODAK, JR., CLERK

APPENDIX

In the

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1058

CENTRAL ILLINOIS PUBLIC SERVICE COMPANY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

Petition For Certiorari Filed February 1, 1977
Certiorari Granted May 2, 1977

The Scheffer Press, Inc.—(312) 263-6850

INDEX

	PAGE
Docket Entries (S.D. Ill.)	1
Docket Entries (7th Cir.)	5
Complaint (with Exhibit)	7
Answer	12
Findings of Fact and Conclusions of Law (S.D. Ill.)	14
Judgment (S.D. Ill.)	19
Opinion (7th Cir.)	20
Judgment (7th Cir.)	28
Order amending opinion (7th Cir.)	29
Order denying petition for rehearing (7th Cir.)	30
Order granting petition for certiorari	31

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-1058

CENTRAL ILLINOIS PUBLIC SERVICE COMPANY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

---

APPENDIX

DISTRICT COURT DOCKET

Date	*Filings-Proceedings*
11/ 4/71	Complaint filed.
11/ 4/71	Summons issued. Original Summons and five copies, with copies of Complaint attached to U.S. Marshal for service.
11/ 9/71	Original Summons returned, executed Nov. 8, 1971, filed.
1/ 6/72	Answer of Defendant, United States of America, filed.
9/18/72	Interrogatories to Plaintiff, filed.
10/12/72	Answer of William H. Kuntzi to Defendant's Interrogatories, filed.

10/18/72 Affidavit of service of interrogatories filed on Oct. 12, 1972, filed.
3/22/74 Pre-trial set for Thursday, June 27, 1974 at 4:30 p.m.
3/22/74 Clerk's Notice of pre-trial setting mailed.
6/26/74 Pre-trial conference reset for Friday, Sept. 13, 1974 at 1:00 p.m. continued on Court's Motion for good cause shown.
7/ 5/74 Clerk's Notice of setting for Sept. 13, 1974, mailed.
9/ 3/74 Answer of United States of America, filed.
9/13/74 Interrogatories to Plaintiff, filed.
9/13/74 Pre-trial conference held.
9/13/74 Bench Trial set for Thursday, Dec. 19, 1974 at 9:00 a.m. at Springfield.
9/13/74 Clerk's Notice of Bench Trial setting mailed.
10/ 7/74 Motion of Plaintiff for Extension of Time Within Which to Answer Interrogatories to Plaintiff filed.
10/11/74 Motion of Plaintiff for Extension of Time Within Which to Answer Interrogatories for 15 days from Oct. 13, 1974, or to Oct. 28, 1974, allowed.
10/25/74 Pre-trial Order filed and entered. Bench trial Dec. 19, 1974, at 9:00 a.m.
10/29/74 Answer of William F. Grant to Defendant's Interrogatories filed.
12/11/74 Plaintiff's Trial Brief filed.
12/12/74 Defendant's Trial Memorandum filed.
12/17/74 Subpoena filed. Served on Joseph M. Roley 12/16/74.
12/17/74 Subpoena filed. Served on Gerard A. Gardner, Sr., 12/16/74.
12/17/74 Subpoena filed. Served on C.H. (Joe) Loring 12/16/74.

12/17/74 Subpoena filed. Served on Jack B. Burdick, Asst. Treas. and Comptroller of IL Power Co.
12/17/74 Subpoena filed. Returned 12/17/74, Jean Molohan not served on vacation, will return 1/6/75.
12/19/74 Stipulation filed.
12/19/74 Both parties in court with counsel; cause is called for bench trial; both sides answer ready; opening statements heard; evidence presented on behalf of Plaintiff; Plainttiff rests; evidence presented on behalf of Government; Government rests; Oral motion to withdraw Attorney Paul Harris, appearance as counsel for Plaintiff; Court allows motion; Rebuttal evidence heard; both sides rest; closing arguments heard; both sides rest; brief to be submitted by Plaintiff—January 20, 1975; Reply brief to be submitted by Government (Feb. 10, 1975). Wood, Judge.
12/19/74 Subpoena on behalf of Plaintiff (Lawrence O. Minder) Date of Service 12/19/74 filed.
12/24/74 Subpoena on behalf of Plaintiff (J.B. Burdick) filed (Date of Service 12/19/74).
1/20/75 Motion for Extension of Time Within which to File Brief on the Law for Plaintiff from Jan. 20, 1975 to Jan. 27, 1975, filed.
1/20/75 Motion of Plaintiff for extension of time within which to file brief to January 27, 1975, allowed. (Wood, Judge)
1/27/75 Brief on the Law for Plaintiff, filed.
1/27/75 Motion of Plaintiff for Leave to File Reply Brief, filed.
1/29/75 Defendant's Opposition to Plaintiff's Motion for Leave to File Reply Brief filed.

2/ 5/75	Plaintiff given leave to file Reply Brief in 10 days after Defendant's Brief is filed. (Wood, Judge)
2/19/75	Defendant's Post Trial Memorandum filed.
2/27/75	Reply to Defendant's Post Trial Memorandum filed.
12/29/75	Findings of Fact and Conclusions of Law and directions for entering Judgment in favor of the Plaintiff and against the Defendant in the amount of $36,615.72 together with interest at the lawful rate and costs.
12/29/75	Judgment filed and entered. Judgment entered in favor of Central Illinois Public Service Company and against the United States of America for the sum of $36,615.72, plus the legal rate of interest and costs of suit.
12/29/75	CLOSED J.S. 6 prepared and mailed 1/3/76.
1/27/76	Court Reporter's Transcript of proceedings had and evidence taken on Dec. 19, 1974, filed. (Original and one copy)
2/26/76	Notice of Appeal filed by United States. Copy of Notice of Appeal mailed to Sharon L. King, Atty and Nafiger & Otten, Atty.
2/26/76	Short Record on Appeal mailed to the U.S. Court of Appeals, 7th Circuit.
3/16/76	Memo from Donald B. Mackay, U.S. Attorney, advising appeal due in Chicago by March 31, 1976.
3/23/76	Certified Copy of Order dated Mar. 18, 1976 from U.S. Court of Appeals, 7th Circuit, setting up procedural schedule—RECORD DUE IN COURT OF APPEALS BY APRIL 1, 1976.

COURT OF APPEALS DOCKET

Date	*Filings-Proceedings*
3/18/76	Entered Order adopting the following procedural schedule: (1) Record on appeal due 4/1/76. (2) Appellant's brief due 4/16/76. (3) Appellee's brief due 5/14/76. (4) Appellant's reply brief due 5/26/76. (5) Appeal will be set for O.A. at some time between 6/1/76 and 6/18/76. Further ordered that U.S. Dist. Clerk for the So. Dist. of IL prepare the entire record on appeal. Issued certified copies of Order to U.S. Dist. Clerk, Court Reporter and J. Wood.
4/19/76	Filed 15c of Appellant's Brief—svc.
5/14/76	Filed 15c of Appellee's Brief—svc.
5/24/76	Entered order setting appeal for oral argument on Wed., 6/9/76, 9:30 a.m. Oral argument limited to 20 mins/side.
5/28/76	Filed 15c of Appellant's Reply Brief—svc.
6/ 9/76	Heard and taken under advisement.
8/17/76	Entered final judgment order REVERSING, with costs.
8/17/76	Filed opinion by Judge Sprecher.
8/23/76	Filed 0&1c appellant's bill of costs in the amount of $111.05.
8/25/76	Filed 0&3c appellee's motion for an extension of time to file petition for petition for rehearing-aff.
9/ 1/76	Entered order granting motion of appellee, rehearing due 9/10/76.

9/ 2/76 Entered order amending opinion—an asterisk be added on page 1 at the end of "Decided August 17, 1976," & footnote be added at bottom of page 1 as follows:
* This opinion has been circulated among all judges of this court in regular active service. Judges Tone & Wood not participating, no active judge favored a rehearing in banc on the question raised by the conflict of this opinion with that of the 4th Cir. in Royster v. United States, 479 F.2d 387 (1973).

9/10/76 Filed 15c petition for rehearing-service-distributed.

11/ 4/76 Entered order denying petition for rehearing.

11/12/76 MANDATE ISSUED

2/ 7/77 Filed notice of filing petition for cert., Supreme Court docket No. 76-1058.

UNITED STATES DISTRICT COURT FOR THE
Southern District Of Illinois
Southern Division

CENTRAL ILLINOIS PUBLIC SERVICE COMPANY,
Plaintiff,

v.

UNITED STATES OF AMERICA,
Defendant.

Civ. No. 4920.

COMPLAINT
[Filed November 4, 1971]

Now comes the plaintiff, Central Illinois Public Service Company, an Illinois corporation, by its attorneys, and complains of the defendant, the United States of America, and says:

1. Plaintiff is a corporation organized and existing under the laws of the State of Illinois, and having its principal office and place of business at 607 East Adams Street, Springfield, Illinois.

2. The defendant is the United States of America.

3. This is an action for recovery of internal revenue taxes and this Court has jurisdiction by reason of Title 28, U.S.C., Section 1346(a).

4. Plaintiff is, and at all times here involved was, a regulated public utility primarily engaged in the generation, transmission, distribution and sale of electric energy and the distribution and sale of natural gas at retail in the State of Illinois. During the year 1963, plaintiff employed approximately 1,900 employees.

5. Recovery is sought of federal employment taxes for the taxable periods ended March 31, 1963, June 30, 1963, September 30, 1963, and December 31, 1963. Plain-

tiff timely paid employment taxes and timely filed Forms 941, Employer Quarterly Federal Tax Return, with the District Director of Internal Revenue, Springfield, Illinois (hereinafter sometimes called the "District Director") for the taxable periods ended March 31, 1963, June 30, 1963, September 30, 1963, and December 31, 1963, respectively. The tax liability timely paid by plaintiff and reported on such returns for such periods is as follows:

Taxable Period Ended:	Withholding Tax	FICA Tax	Total Withholding and FICA Tax
March 31, 1963	$491,730.13	$251,567.72	$743,297.85
June 30, 1963	471,429.02	231,230.68	702,659.70
September 30, 1963	511,403.31	134,213.31	645,616.62
December 31, 1963	491,927.41	37,716.47	529,643.88

On or about April 2, 1971, the District Director assessed against plaintiff additional withholding taxes, together with interest thereon, for each of the taxable periods here involved in the following amounts:

Taxable Period Ended:	Witholding Tax Assessed	Interest Assessed	Total
March 31, 1963	$ 6,337.04	$ 3,013.22	$ 9,350.26
June 30, 1963	6,700.35	3,084.36	9,784.71
September 30, 1963	6,711.27	2,988.72	9,699.99
December 31, 1963	5,439.84	2,340.92	7,780.76
Total	$25,188.50	$11,427.22	$36,615.72

On April 12, 1971, plaintiff paid to the District Director on account of such assessments the sum of $36,615.72. Plaintiff alleges that such additional withholding taxes and the interest thereon were erroneously and illegally assessed and collected and demands recovery of $36,615.72, together with such interest as is allowed by law.

6. On April 16, 1971, plaintiff filed with the District Director a claim for refund, a copy of which is attached hereto, marked Exhibit A and made a part hereof. Six months have elapsed since such claim for refund was filed and no action has been taken thereon.

7. During the taxable periods ended March 31, 1963, June 30, 1963, September 30, 1963, and December 31, 1963, plaintiff reimbursed employees for meal expenses incurred while they were traveling on the business of plaintiff on trips which did not keep the employees away from home overnight. Plaintiff did not withhold federal income tax on such reimbursements since the reimbursements were not "wages" within the meaning of Section 3401 of the Internal Revenue Code of 1954 and thus were not subject to income tax withholding under Section 3402 of the Code. The District Director erroneously treated such reimbursements as "wages" subject to withholding for federal income tax purposes and erroneously and illegally collected from plaintiff federal withholding tax in the amount of $25,188.50 and interest thereon in the amount of $11,427.22, no part of which was deducted or withheld by plaintiff from its employees. Plaintiff is entitled to recover $36,615.72, together with interest thereon as allowed by law.

8. Plaintiff has overpaid federal employment taxes for the taxable periods ended March 31, 1963, June 30, 1963, September 30, 1963, and December 31, 1963, is the sole owner of the aforementioned claim for refund attached hereto as Exhibit A, and has made no assignment of that claim.

Wherefore, plaintiff demands judgment in the amount of $36,615.72, plus such interest and costs as are allowed

by law, and such other relief as the Court may deem just and equitable.

Central Illinois Public Service Company
By /s/ Sharon L. King
Sharon L. King
Isham, Lincoln & Beale
One First National Plaza
Chicago, Illinois 60670
Area Code 312—786-7500
Attorneys for Plaintiff

Of Counsel:
Paul V. Harris
20 North Wacker Drive
Chicago, Illinois 60606

Form 843 (Rev. Dec. 1970) Department of the Treasury Internal Revenue Service

Claim

Director's Stamp (Date received)

RECEIVED
APR 20 1971

The Internal Revenue Service will indicate in the block below the kind of claim filed, and fill in, where required.

- ☐ Refund of Taxes Illegally, Erroneously, or Excessively Collected.
- ☐ Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.
- ☐ Abatement of Tax Assessed (not applicable to income, estate or gift taxes).

Please Type or Print Plainly

Name of taxpayer or purchaser of stamps: Central Illinois Public Service Company

Number and street: 607 East Adams Street

City or town, State, and ZIP code: Springfield, Illinois 62701

Fill in applicable items—Use attachments if necessary

a. Your social security number	Wife's number, if joint return	b. Employer identification number (if any)
		37-0211300

c. Internal Revenue Service office where return (if any) was filed: Springfield, Ill.

d. Name and address shown on return, if different from above:

e. Period—If tax is reported on annual basis, prepare separate form for each taxable year: from January 1 1963 to December 31 19 63

f. Kind of tax: Employment

g. Amount of assessment: $ 2,657,833.77

Dates of payment: 3/31/63, 6/30/63, 9/30/63, 12/31/63 and 4/12/71.

h. Date stamps were purchased from Government:

i. Amount to be refunded (if income tax, complete computation below): $ 36,615.72*

j. Amount to be abated (not applicable to income, estate, or gift taxes): $

k. The claimant believes that the claim should be allowed for the following reasons:

The taxpayer is not liable for payment of tax under Section 3403 of the Internal Revenue Code of 1954 on reimbursements to its employees for meal expenses incurred while traveling on the business of the taxpayer on trips which did not keep the employees away from home overnight since these reimbursements were not "wages" within the meaning of Section 3401 of the Code and thus were not subject to income tax withholding under Section 3402 of the Code. The District Director erroneously treated such payments as "wages" subject to withholding for federal income tax purposes and erroneously asserted liability against taxpayer for payment of tax under Section 3403 with respect to such reimbursements.

* or such greater amount as may be legally refundable.

Computation of Income Tax Refund	Income Tax
1 Tax withheld	
2 Estimated tax paid	
3 Tax paid with original return	
4 Any additional income tax paid	
5 Total tax paid (add lines 1–4)	
6 Less: Your computation of correct tax	
7 Amount of overpayment	
8 Amount previously refunded	
9 Net overpayment (enter in item i above)	

Under penalties of perjury, I declare that I have examined this claim, including accompanying schedules and statements, and to the best of my knowledge and belief it is true, correct, and complete.

Central Illinois Public Service Company

Signed W. H. Kuntzi

Dated April 16, 19 71 W. H. Kuntzi, Controller

OMB approval No. 48-R0332 See instructions on reverse. Form 843 (Rev. 12-70)

Exhibit A

IN THE
United States District Court For The
Southern District Of Illinois
Southern Division

[Title Omitted in Printing]

ANSWER

[Filed January 6, 1972]

Comes now the defendant, the United States of America by its attorney, Donald B. Mackay, United States Attorney for the Southern District of Illinois, for its answer to the complaint, states as follows:

1. Admits the allegations contained in paragraph 1 of the complaint.

2. Admits the allegations contained in paragraph 2 of the complaint.

3. Admits the allegations contained in paragraph 3 of the complaint.

4. Admits the allegations contained in paragraph 4 of the complaint.

5. Admits the allegations contained in paragraph 5 of the complaint, except denies the allegation that such additional withholding taxes for the four quarters of 1963 and interest thereon were erroneously and illegally assessed and collected.

6. Admits the allegations contained in paragraph 6 of the complaint, except denies every allegation contained in said claim for refund, Exhibit A, not otherwise admitted herein and specifically avers that said claim for refund was rejected on December 7, 1971.

7. Admits the allegations contained in paragraph 7 of the complaint, except denies the allegations that:

(a) the reimbursements were not "wages" within the meaning of Section 3401 of the Internal Revenue Code of 1954 and thus were not subject to income tax withholding under Section 3402 of the Code;

(b) the District Director erroneously treated such reimbursements as "wages" subject to withholding for federal income tax purposes and erroneously and illegally collected from plaintiff federal withholding tax in the amount of $25,188.50, and interest thereon in the amount of $11,427.22; and

(c) plaintiff is entitled to recover $36,615.72, plus interest according to law.

8. Denies the allegations contained in paragraph 8 of the complaint, except admits that plaintiff is the sole owner of the claim for refund and has made no assignment of that claim.

Wherefore, the defendant prays that the claim be dismissed and that judgment be entered for the defendant, together with costs.

.....
United States Attorney

Of Counsel:
/s/ Michael von Mandel
Michael von Mandel
Trial Attorney
Tax Division
Department of Justice
Washington, D.C. 20530

[Certificate of Service omitted in printing]

CENTRAL ILLINOIS PUBLIC SERVICE COMPANY,
Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

Civ. No. 4920.

United States District Court,
S. D. Illinois, S. D.
Dec. 29, 1975.

Suit was brought by corporate employer for refund of deficiency assessed by federal government for additional withholding taxes and interest in connection with certain lunch payments to employees. The District Court, Harlington Wood, Jr., J., held that where employees, who were paid depending on their classification either $1.40 or actual lunch expenses for lunches eaten away from company while on company business, rendered no service to company during noon hour, lunch payments were unrelated to employee's specific job title, nature of his work or rate of pay, and payments could hardly be considered money making proposition for employees, such payments were not "wages" for services rendered and thus did not require withholding by employer.

Judgment for plaintiff.

Internal Revenue—1766.3

Where employees, who were paid depending on their classification either $1.40 or actual lunch expenses for lunches eaten away from company while on company business, rendered no service to company during noon hour, lunch payments were unrelated to employee's specific job title, nature of his work, or rate of pay, and as practical matter such payments could hardly be considered money making proposition for employees, such payments were

not "wages" for services rendered and thus did not require withholding by employer.

Sharon L. King, Isham, Lincoln & Beale, Chicago, Ill., for plaintiff.

Nafzinger & Otten, Kenneth H. Otten, Springfield, Ill., Michael von Mandel, Trial Atty., Tax Div., Dept. of Justice, Washington, D.C., Donald B. Mackay, U.S. Atty., Springfield, Ill., for defendant.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

Harlington Wood, Jr., District Judge.

This case was tried before the Court without a jury. Thereafter counsel filed briefs.

The issue is found for Plaintiff and against the Defendant.

That only issue is whether or not the Internal Revenue Code of 1954 required that the Plaintiff company withhold taxes on payments it made on occasion to some of its employees for lunch. If an employee was away from home and traveling on the company's business during the day and ate lunch wherever he was without returning for that purpose, the company paid the employee in one classification an amount not to exceed $1.40, and certain other employees an amount as reimbursement for the actual cost of the lunch. These classifications related only to the particular geographical division of the company where the employee worked, or his union status and are not relevant to the tax question. Overnight trips also are not involved. The company considerd the lunch payments to be travel expenses not subject to withholding and therefore nothing was withheld by the company on these payments. The Government claims however that these lunch payments were additional wages and therefore subject to

withholding. The Government assessed a deficiency against the company in 1971 for additional withholding taxes together with interest for four taxable quarters in 1963 amounting to $25,188.50 in taxes with $11,427.22 in taxes, or a total amount of $36,615.72. The company paid this amount and brings this suit for refund.

There appears to be little dispute about the underlying facts.

The company is an Illinois corporation having its principal office in Springfield, Illinois, and is a public utility engaged in the generating, transmissions, distribution and sale of electric energy and the distribution and sale of natural gas in Illinois.

The company reimbursed its employees for legitimate travel expenses which included these lunch payments in accordance with its established policy. If the employee was on a required trip for the company's business, the employee made an accounting on a company form which he turned in to his supervisor for approval followed by payment by the company. For employees in one category this was not to exceed $1.40 regardless of the cost of the lunch, and for others the amount was reimbursement for actual lunch expenses. The evidence disclosed that depending on the individual and the circumstances the $1.40 rate was sometimes in excess of the actual lunch cost, but very often it was insufficient to cover the cost. Depending on where the employee was assigned on a particular day some would go home for lunch and thus not be entitled to the reimbursement; however, these employees who took their lunch from home with them on a company trip were also entitled to the payment. Even in 1963 the $1.40 rate was modest considering that many of these employees were men engaged in open air labor. As a practical matter,

it could hardly be considered a money making proposition for an employee.

There are facts which this Court believes distinguishes this case from the case of the usual employee who leaves his office at noon to go out for lunch. The employee in the present case is away from home in travel status. He renders no service to the company during his lunch. Usually the employee would not be at the actual work site, but at a restaurant in the vicinity. He was off duty during this time. His time was his own. The employee was, however, subject to call during the noon hour, but all the employees in this public utility business were generally subject to call, not just during the lunch break, at any time as emergencies might require. These lunch payments were unrelated to the employee's specific job title, the nature of his work or rate of pay. It appears that this lunch payment arrangement was beneficial and convenient for the company and served its business interest. It saved the company employee time otherwise spent in traveling back and forth as well as the usual travel expenses.

Against this factual background this Court is of the opinion that the Government's view that these payments were "wages" in this particular case requires a departure from the realities of business life and a vigorous stretching of the statute to try to include the lunch payments as being for services rendered to the company. *U. S.* v. *Correll,* 389 U.S. 299, 88 S.Ct. 445, 19 L.Ed.2d 537 (1967) relating to deductibility of travel expenses by an employee does not thereby automatically require withholding by the employer. The present case is not one where the company is asking that the Federal Treasury help finance its employees' meals.

There are some noncritical factual distinctions but this Court is persuaded by the views expressed in *Royster* v. *U. S.*, 479 F.2d 387 (4th Cir. 1973). The payments there under somewhat similar circumstances were held not to be remuneration for services performed to the employer. I believe the situation in this present case is substantially the same.

Therefore, the Plaintiff shall have judgment in the amount of $36,615.72 together with interest thereon.

UNITED STATES DISTRICT COURT
For The
Southern District of Illinois—Southern Division

Civil Action File No. 4920

CENTRAL ILLINOIS PUBLIC SERVICE COMPANY,
Plaintiff,

v.

UNITED STATES OF AMERICA,
Defendant

JUDGMENT

This action came on for trial before the Court, Honorable Harlington Wood, Jr., United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is Ordered and Adjudged that the plaintiff, Central Illinois Public Service Company recover of the defendant, United States of America the sum of Thirty-six Thousand Six Hundred Fifteen and 72/100 Dollars ($36,615.72), with interest thereon at the legal rate as provided by law, and its costs of action.

Dated at Springfield, Illinois ....., this 29th ..... day of December ....., 1975.

/s/ William J. Littell
William J. Littell
Clerk of Court

CENTRAL ILLINOIS PUBLIC SERVICE CO.,
Plaintiff-Appellee,

v.

UNITED STATES OF AMERICA,
Defendant-Appellant.

No. 76-1277.

United States Court of Appeals,
Seventh Circuit.

Argued June 9, 1976.

Decided Aug. 17, 1976*

As Amended Sept. 2, 1976.

Corporate employer brought suit for refund of deficiency assessed for additional withholding taxes and interest in connection with certain lunch payments to employees. The United States District Court for the Southern District of Illinois, Harlington Wood, Jr., J., 405 F.Supp. 748, rendered judgment against the Government, and it appealed. The Court of Appeals, Sprecher, Circuit Judge, held that reimbursements for employees' lunches eaten while on nonovernight trips away from their home areas constistituted "wages" under the income tax withholding provisions, and tax on those reimbursements thus had to be withheld by the employer.

Reversed.

---

* This opinion has been circulated among all judges of this court in regular active service. TONE and HARLINGTON WOOD, JR., Circuit Judges, not participating, no active judge favored a rehearing *in banc* on the question raised by the conflict of this opinion with that of the Fourth Circuit in *Royster* v. *United States*, 478 F.2d 387 (1973).

1. Internal Revenue—1766.3

Reimbursements for employees' lunches eaten while on nonovernight trips away from their home areas constituted "wages" under the income tax withholding provisions, and tax on those reimbursements thus had to be withheld by the employer. 26 U.S.C.A. (I.R.C. 1954) § 3401(a).

See publication. Words and Phrases for other judicial constructions and definitions.

2. Internal Revenue—555

Reimbursements made for meals on a nonovernight trip are nondeductible income.

3. Internal Revenue—341

Not all payments constituting income to an employee fall into the category of remuneration for employees services or "wages." 26 U.S.C.A. (I.R.C. 1954) § 3401(a).

Scott P. Crampton, Asst. Atty. Gen., Alfred S. Lombardi, Atty., Tax Div., Dept. of Justice, Washington, D. C., Donald B. MacKay, U. S. Atty., Springfield, Ill., for defendant-appellant.

Sharon L. King, Chicago, Ill., for plaintiff-appellee.

Before FAIRCHILD, Chief Judge, and SWYGERT and SPRECHER, Circuit Judges.

SPRECHER, Circuit Judge.

[1] This case concerns whether reimbursements for employees' lunches eaten while on non-overnight trips away from their home areas are considered "wages" under the income tax withholding provisions, 26 U.S.C. § 3401(a) and thus whether tax on these reimbursements must be withheld by the employer.

I

Central Illinois Public Service Company (the company), a public utility, supplies electricity and natural gas to an extensive area of downstate Illinois. Because of the size of its service area, employees often have to travel away from their home base, both on day trips during normal business hours and on overnight trips. The company, in accord with a longstanding policy, reimburses its employees for legitimate expenses of transportation, meals and lodging when traveling on company business. In the present case, only reimbursements made for lunches eaten away from employee's normal duty area during non-overnight trips are at issue.

The company reimburses employees for these lunches if they are taken away from their normal work stations or job sites at the time of their noonday meal. The amount of reimbursement depends upon the employee's status. Union employees and operating employees of the Western Division (the only division of the company as yet ununionized) receive a flat rate of $1.40 per noonday meal eaten away from their normal post of duty. This is provided for in the union's collective bargaining agreement. The full $1.40 can be, and often is, claimed regardless of the amount actually spent on lunch—in many cases the reimbursement is claimed even when the employee brings his lunch from home. Other employees—those on a salaried basis—are reimbursed for their actual expenses up to $25 per meal. During 1963, the Tax year in question, the company paid its employees $139,936.12 in reimbursements for such noonday meals. The company did not withhold income tax for its employees with respect to this sum.

In 1971, the District Director of Internal Revenue Service assessed against the company withholding taxes for these noon-meal reimbursements (plus interest thereon)

totaling $36,615.72. The company paid the sum and sued for a refund. The district court held that the reimbursements were not "wages" under 26 U.S.C. § 3401(a) relying primarily on a case from the Fourth Circuit, *Royster Co.* v. *United States,* 479 F.2d 387 (4th Cir. 1973) Thus it held that the reimbursements were not subject to withholding for income tax purposes and rendered judgment for the plaintiffs. The government appealed.

II

Under the Internal Revenue Code provisions requiring collection of income tax at its source, 26 U.S.C. §§ 3401 *et seq.,* an employer must withhold from an employee and pay to the government a certain portion of the employee's "wages." Section 3401(a) defines "wages" as "all remuneration . . . for services performed by an employee for his employer, including the cash value of all remuneration paid in any medium other than cash . . . ." The regulations further make clear that the name by which the remuneration is designated is immaterial, as is the basis upon which it is paid.[1] The question which this

[1] Treas. Reg. § 31.3401(a)-1(a) provides:

(1) The terms "wages" means all remuneration for services performed by an employee for his employer unless specifically excepted under section 3401(a) or excepted under section 3402(e).

(2) The name by which the remuneration for services is designated is immaterial. Thus, salaries, fees, bonuses, commissions on sales or on insurance premiums, pensions, and retired pay are wages within the meaning of the statute if paid as compensation for services performed by the employee for his employer.

(3) The basis upon which the remuneration is paid is immaterial in determining whether the remuneration constitutes wages. Thus, it may be paid on the basis of piecework, or a percentage of profits; and may be paid hourly, daily, monthly, or annually.

case presents is whether reimbursements for noon meals on non-overnight trips constitute "wages" as so defined.

[2, 3] Clearly, these reimbursements are non-deductible income to the employees. In *United States* v. *Correll,* 389 U.S. 299, 88 S.Ct. 445, 19 L.Ed.2d 537 (1967), the Supreme Court upheld the ruling of the Commissioner (*see, e.g.,* Treas.Reg. § 1.162—17(b)(3)(ii)) that expenses incurred for meals on business trips are deductible only if the trip requires sleep or rest (i. e., and overnight stay. Thus, these reimbursements made for meals on a non-overnight trip are non-deductible income. *Wilson* v. *United States,* 412 F.2d 694 (1st Cir. 1969) (reimbursement for "mid-shift" meal of state trooper, given if the trooper was more than 10 miles from home barracks, held non-deductible income). However, as the government concedes, not all payments constituting income to an employee fall into the category of remuneration for employee services or "wages."

The Supreme Court although not having interpreted this particular section, on at least two occasions has given broad definition to that which constitutes remuneration for employee services. In *Commissioner* v. *LoBue,* 351 U.S. 243, 247, 76 S.Ct. 800, 803, 100 L.Ed. 1142 (1956), the Court wrote:

> When assets are transferred by an employer to an employee to secure better services they are plainly compensation. . . . LoBue received a very substantial economic and financial benefit from his employer prompted by the employer's desire to get better work from him. This is "compensation for personal service" within the meaning of § 22(a).

And in *Social Security Board* v. *Nierotko,* 327 U.S. 358, 365-66, 66 S.Ct. 637, 641, 90 L.Ed. 718 (1946), the Court wrote:

> We think that "service" . . . means not only work actually done but the entire employer-employee relationship for which compensation is paid to the employee by the employer.

These statements lead us to agree with the view taken by the Second Circuit in *Educational Fund of the Electrical Industry* v. *United States,* 426 F.2d 1053 (2d Cir. 1970). In that case, the question presented was whether $140 paid to electricians in lieu of wages for successfully attending a one-week course at a school established by the union constituted "wages" for withholding purposes. The court held that it did.

> The $140 payments to those who attended the school represented part of the benefit package which was negotiated as part of the wage structure under the collective bargaining agreement in effect between the employers and the union as representative of the electrical workers. The payments ultimately derived from the employers and represented a portion of the agreed upon remuneration for services performed by the employees within the intent of Section 3401(a), just as do payments from pension and vacation funds.

Id., at 1056. This expansive definition of "wages" seems appropriate and harmonizes well with the underlying purposes of the withholding tax system to collect income at its source and to prevent unexpected burdensome tax liabilities come April 15.[2]

---

[2] This view accords well with the legislative history of a similar provision, the definition of "wages" under the social security tax system, 26 U.S.C. § 3121, a definition held to have "the same essential meaning" as that for withholding. *Royster Co.* v. *United States,* 479 F.2d 387, 390 (4th Cir. 1973) The House Report on the initial Social Security Bill, H.R. 7260, 74th Cong., 1st Sess., stated:

> Wages include not only the cash payments made to the employee for work done, but also compensation for services in any other form, such as room, board, etc.

Having found this view appropriate, the opinion of the Fourth Circuit in *Royster Co.* v. *United States*, 479 F.2d 387 (4th Cir. 1973), appears unpersuasive. The court in *Royster* held that payments to salesmen to reimburse them for the cost of their noon meals while in their sales territory did not constitute "wages" for withholding purposes. The government concedes, as it must, that *Royster* is not meaningfully distinguishable from the present case. The *Royster* court took a narrow view of the meaning of "remuneration for services" holding that because the salesmen "performed no services while eating, directly or indirectly," the reimbursement for the meal was not remuneration for services. *Id.*, at 391.

Remuneration for services cannot be viewed this narrowly. The employment relationship is a two-sided bargain, with the employee's services being given for a total package of remuneration, including salary, pension, paid vacation time and other remuneration such as reimbursed lunches. Clearly, in the present case, the employer had no obligation to pay for employee lunches. And certainly, the employee gains by the payment; otherwise, the employee would have to pay for lunch himself. It cannot be doubted that the lunch reimbursements are part of a total package of remuneration designed to attract and hold good employees to the company. As such, they must

---

[2] (Continued)

H.R.Rep. No. 615, 74th Cong., 1st Sess., p. 32 (1939—2 Cumm.Bull. 600, 606). The Senate Report contained similar language:

> The term "wages" is defined to mean all remuneration for employment, including the cash value of all remuneration paid in any other medium than cash. *That is, in addition to money payments, it includes payments in kind, rent, food, lodging, etc.*

S.Rep. No. 628, 74th Cong., 1st Sess., p. 49 (1939—2 Cumm. Bull. 611, 623) (emphasis supplied).

be considered "wages" under 26 U.S.C. § 3401(a) for withholding tax purposes.[3]

Since the noon meal reimbursements at issue in this case are "wages," the employer is liable for withholding tax on them. Thus, the assessment of the District Director against the company was proper. The judgment of the district court is reversed.

Reversed.

---

[3] The company agrees that whatever these reimbursements are classified as, they are still excludable under Treas. Reg. § 31.3401(a)-1(b)(2) concerning traveling expenses. The regulation provides in relevant part:

> Amounts paid specifically—either as advances or reimbursements—for traveling or other bona fide ordinary and necessary expenses incurred or reasonably expected to be incurred in the business of the employer are not wages and are not subject to withholding.

However, to be travel expenses, the employee must be on travel status; that is, he must be on an overnight trip. *United States* v. *Correll*, 389 U.S. 299, 88 S.Ct. 445, 19 L.Ed.2d 537 (1967). Here the employees were not traveling overnight, and thus, the reimbursements were not travel expenses. Nor were the reimbursements necessary business expenses, for an employee's lunch without more, is not an "ordinary and necessary expense . . . incurred in the business of the employer."

Opinion by Judge Sprecher

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

August 17, 1976

Before
Hon. THOMAS E. FAIRCHILD, *Chief Judge*
Hon. LUTHER M. SWYGERT, *Circuit Judge*
Hon. ROBERT A. SPRECHER, *Circuit Judge*

CENTRAL ILLINOIS PUBLIC SERVICE CO.,
Plaintiff-Appellee,

No. 76-1277 vs.

UNITED STATES OF AMERICA,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Illinois.
Civil No. 4920
HARLINGTON WOOD, JR., *Judge*

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Illinois and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED, with costs, in accordance with the opinion of this Court filed this date.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

September 2, 1976

Before
Hon. ROBERT A. SPRECHER, *Circuit Judge*
Hon. .....
Hon. .....

CENTRAL ILLINOIS PUBLIC SERVICE CO.,
Plaintiff-Appellee,

No. 76-1277 vs.

UNITED STATES OF AMERICA,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Illinois.
Civil No. 4920
HARLINGTON WOOD, JR., *Judge*

ORDER

The opinion in this case, decided August 17, 1976, is amended to reflect the action taken prior to its issuance by the court *in banc.*

It Is Ordered that an asterisk be added on page 1 of the slip opinion at the end of "Decided August 17, 1976," and that a footnote be added at the bottom of page 1 as follows:

> * This opinion has been circulated among all judges of this court in regular active service. Judges Tone and Wood not participating, no active judge favored a rehearing *in banc* on the question raised by the conflict of this opinion with that of the Fourth Circuit in *Royster* v. *United States,* 479 F.2d 387 (1973).

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

November 4, 1976

Before

Hon. THOMAS E. FAIRCHILD, *Chief Judge*
Hon. LUTHER M. SWYGERT, *Circuit Judge*
Hon. ROBERT A. SPRECHER, *Circuit Judge*

CENTRAL ILLINOIS PUBLIC SERVICE CO.,
Plaintiff-Appellee,

No. 76-1277 vs.

UNITED STATES OF AMERICA,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Illinois.

No. 4920

HARLINGTON WOOD, JR., *Judge*

On consideration of the petition for rehearing filed in the above-entitled cause, all of the members of the panel having voted to deny a rehearing,

IT IS ORDERED that the petition for rehearing in the above-entitled cause be, and the same is hereby, DENIED.

SUPREME COURT OF THE UNITED STATES

No. 76-1058

CENTRAL ILLINOIS PUBLIC SERVICE COMPANY,
Petitioner,

v.

UNITED STATES

Order Allowing Certiorari. Filed May 2, 1977

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted. The case is set for oral argument in tandem with No. 76-1095, Commissioner of Internal Revenue v. Kowalski.